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No. 80-318

In the Supreme Court of the United States

October Term, 1980

EXXON CORPORATION, *et al.*,
Appellants,

vs.

CITY OF MENTOR, OHIO,
Appellee.

ON APPEAL FROM THE OHIO COURT OF APPEALS
FOR THE ELEVENTH DISTRICT

MOTION TO DISMISS

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MOTION TO DISMISS

Pursuant to Rule 16.1 (b) of the Rules of the United States Supreme Court, appellee moves this Court for an order dismissing the present appeal from the Ohio Court of Appeals, Eleventh Appellate District, for the reasons that the appeal does not present a substantial federal question and the judgments of the state courts below rest on an adequate non-federal basis.

BRIEF IN SUPPORT OF MOTION TO DISMISS

In their Jurisdictional Statement, the appellants have presented for this Court's consideration a question which is wholly unsupported by the record.

Underlying all of the appellants' arguments and conclusions is the major premise that the appellant property

owner, Robert J. Amsdell (hereinafter, appellant Amsdell), is deprived of absolutely all economic use of his property by the zoning ordinance in question. As a corollary, appellants have also represented to this Court that the trial court's sole consideration in denying appellants' petition was to maintain the integrity of the appellee's comprehensive zoning plan. The record and the judgment of the trial court give no support to either of those propositions. The question presented by the appellants, and their supporting arguments, all assume a statement of facts from evidence as construed most favorably to the appellants and not as found by the trial court or otherwise supported by the record.

At the crux of the Jurisdictional Statement is appellants' argument that the operation of the Mentor zoning ordinance at issue results in a total, complete deprivation of absolutely all economic use of the subject property. Indeed, that proposition is embodied in the appellants' statement of the questions presented for review by this Court wherein appellants claim that the ordinance "prohibits . . . any economic use" of the property. Jurisdictional Statement (hereinafter cited as Jur. St.), 1. *Cf.*, Jur. St. at 15, 17, 18, 19, 23, 26, 27, 28, 29, 31 and 35.

The premise that this ordinance constitutes a total deprivation of all economic use of the property is in sharp contrast to the evidence elicited at trial and as effectively found as fact by the trial court in its opinion. In similar contrast is appellants' contention that the sole justification for the trial court's denying their requested use of the property as a gasoline service station rather than for residential purposes, as presently zoned, is a desire to maintain the integrity of appellee's comprehensive zoning plan. Jur. St., A-16 through A-19. Rather than directly confront the factual conflict on this appeal, the appellants have, at least for purposes of the Jurisdictional Statement, cava-

lierly assumed as fact their most favorable statement of the evidence as if the trial court had wholly adopted the testimony of appellants' witnesses while entirely disregarding testimony elicited by appellee. To the contrary, the trial court was quite specific in weighing all of the evidence and in reaching its various conclusions. Jur. St., A-13 *et seq.*

Even a casual reading of the trial court's opinion, reproduced in the Jurisdictional Statement at A-13 *et seq.*, discloses the acute factual discrepancies before the trial court and the court's findings. The trial court carefully detailed the testimony offered by all parties regarding development of the property as a gasoline service station rather than residential property vis-a-vis such varied questions as terrain (Jur. St., A-18), drainage (Jur. St., A-19), traffic impact and safety (Jur. St., A-19, A-23, and A-30), economic profit from development (Jur. St., A-20, A-21, A-23, and A-32), and the zoning and development of contiguous and surrounding property (Jur. St., A-23 through A-26).

Against this background of countervailing evidence offered as to all of these issues, the trial court noted that the witnesses called by the appellants and those called by the appellee ". . . had diametrically opposite opinions as to all essential matters." Jur. St., A-21. The trial court found only one area of agreement in the evidence and that was in the fair market values of the property if developed as residential property or as a gasoline service station. Jur. St., A-21.

Appellants' contention that the property is devoid of any economic value unless used as a gasoline service station is simply erroneous. The trial court noted that there was testimony from two of appellee's witnesses detailing diagrams of profitable residential construction on appellants'

property. Jur. St., A-21. The trial court also commented on evidence in the form of "numerous exhibits" showing residential development of similarly situated property. Jur. St., A-23 and A-24. There was substantial evidence that this property can be developed as residential property and it does have appreciable economic value as residential property; or, at least, so the trial court concluded.

Appellants have noted that a zoning regulation must serve a legitimate state interest and must leave the property owner "some economic use" of the property, citing *Euclid v. Ambler Realty*, 272 U.S. 365 (1926), and *Penn Central Transportation v. New York*, 438 U.S. 104 (1978). Jur. St., 21 and 22. The trial court did in fact find that a legitimate state interest was served by the zoning regulation and that the appellants' property has some economic value as residential property and is not economically valueless as appellants have argued to this Court. Jur. St., A-28 and A-32.

That this same property may have a greater economic value when zoned for a gasoline service station is hardly dispositive of the issues. The balancing of public and private interests involved in zoning legislation was implicitly recognized by this Court at least as early as the seminal case, *Euclid v. Ambler Realty, supra.*

In the case at bar, the trial court found ". . . that the advantage in a change of zoning on the subject parcel is almost entirely the increased profit to the owner." Jur. St., A-23. The court below did not find any advantage whatever to the public. To the contrary, while acknowledging the increased traffic hazard from a gasoline service station on this property, the court also found the surrounding area to be "adequately served" by having thirty-seven gasoline stations within a two and one-half mile radius of the subject property. Jur. St., A-23.

The trial court also found it noteworthy that appellant Amsdell is a "sophisticated investor" who purchased the property well after the enactment of the zoning ordinace in question and with full awareness of the existing residential zoning. Jur. St., A-24. Appellant Amsdell purchased this property zoned as residential with the hope of obtaining the necessary change of zoning to allow the construction of a gasoline service station and resulting in the corresponding profit. *Cf.*, Jur. St., A-22. Appellants now claim that it is unconstitutionally confiscatory not to allow their speculative scheme to realize consummate fruition. The Constitution certainly does not guarantee anyone a profit nor does it prohibit a loss from speculative investment.

The record below discloses very distinct factual issues and conflicts in testimony which were resolved by the trial court in its judgment and the supporting opinion. On appeal to the Ohio Court of Appeals, Eleventh Appellate District, the appellants sought reversal on the ground, *inter alia*, that ". . . the trial court's decision [was] contrary to the weight of the evidence . . ." Jur. St., A-7. The Ohio Court of Appeals reviewed the evidence, found it sufficient to sustain the judgment of the trial court, and affirmed the judgment below. Jur. St., A-8 and A-3. Appellants' argument in the Jurisdictional Statement implicitly quarrels with the trial court's findings of fact, assuming facts and drawing conclusions from facts which the trial court did not find.

Perhaps inadvertently, the appellants explicitly reach the gravamen of their argument in the Jurisdictional Statement at A-31:

> "*The Ohio Courts . . . ignored the evidence* that the ordinance rendered Appellants' property useless *and*

> *refused to consider* the ordinance's harsh economic impact on an Appellants' particular parcel of property." (Emphasis supplied).

Jur. St., A-31. Aside from the fact that this argument is substantively untrue, it does serve the purpose of illustrating that, despite appellants' attempts to couch this appeal in constitutional terms, this case turns only on the facts.

This Court should not now delve into this factual dispute. The deference which this Court assigns to findings of fact by the courts below is palpable. A simple statement of the Court's view of weighing the evidence and making factual determinations is found in *Norton Co. v. Department of Revenue,* 340 U.S. 534 (1951):

> "Of course, in constitutional cases, we have power to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded, but that does not mean that we will reexamine, as a court of first instance, findings of fact supported by substantial evidence."

340 U.S. at 538. The trial court's opinion, which is appended to the Jurisdictional Statement, intrinsically discloses substantial evidence to support its conclusions and judgment.

Although the power is certainly there for the Court to accept jurisdiction of the case at bar and to make independent factual determinations, such a result would be extremely inconsistent with prior decisions on that issue. The Court noted its usual approach to factual determinations in *Pennekamp v. Florida,* 328 U.S. 331 (1946):

> "While the ultimate power is here to ransack the record for facts in constitutional controversies, we are accustomed to adopt the result of the state court's exam-

> ination. It is the findings of the state courts on undisputed facts or the undisputed facts themselves which ordinarily furnish the basis for our appraisal of claimed violations of federal constitutional rights."

328 U.S. at 345. The record discloses facts which are anything but undisputed, the trial court's having found dispute as to "all essential matters." Jur. St., A-21.

Regarding factual review on appeal, this Court has developed the "two-court rule" pertaining to cases where the facts have been reviewed by two lower courts. A statement of the rule and its underlying policy is found in *Berenyi v. District Director*, 385 U.S. 630 (1967). The Court was asked in *Berenyi* to review and reject a factual conclusion which was reached by the trial court and which was affirmed by the appellate court. The Court refused to make the factual inquiry, noting the rule as follows:

> "In order to do so, we would be forced to disregard this Court's repeated pronouncements that it 'cannot undertake to review concurrent findings of fact by two courts below in the basence of a very obvious and exceptional showing of error.' . . .
>
> The policy underlying the 'two-court' rule is obvious. This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues. When, as here, resolution of the disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force."

385 U.S. at 635 and 636.

In the case at bar, the trial court made findings of fact and drew conclusions from those findings. The suffi-

ciency of the evidence expressly was challenged and was affirmed by the appellate court below. The two-court rule precludes any further consideration of the evidence on this appeal.

CONCLUSION

Appellants' arguments notwithstanding, this case does not present a substantial federal question. Appellants' arguments all presuppose the existence of facts which either were not believed or were not found by the trial court. The decisions of the Ohio courts thus rest on an adequate non-federal basis and review should be denied. It would be strikingly inconsistent with the prior decisions of this Court to accept review and confront these factual issues anew.

Respectfully submitted,

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